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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1276

DORTHA ALLEN GUY,

Petitioner,

—v.—

ROBBINS & MYERS, INC.

BRIEF FOR PETITIONER

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Dortha Allen Guy,

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Robbins & Myers, Inc.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 525 F.2d 124 (Pet. 11a-22a).[1] The Court of Appeals denied rehearing (Pet. 23a). The orders and opinions of the district court dismissing the petitioner's Title VII claims, which are not officially reported, appear at 8 EPD ¶¶ 9573 and 9574, 8 FEP Cases 311 and 313[2] (Pet. 1a-5a; 6a-10a).

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[1] References in this form are to the appendix to the petition for a writ of certiorari filed in No. 75-1276.

[2] The district court's opinion dismissing the petitioner's claim filed pursuant to 42 U.S.C. §1981 appears at 8 EPD ¶9572, 8 FEP Cases 309 (IUE Pet. 14a-19a). References in this form are to the appendix to the petition for a writ of certiorari filed in No. 75-1264, which has been consolidated for argument with this case.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1). The opinion of the United States Court of Appeals for the Sixth Circuit was entered on October 24, 1975; that Court denied petitioner's petition for rehearing on December 9, 1975. The Petition for a Writ of Certiorari was filed on March 8, 1976 and was granted on April 26, 1976.

Statutory Provisions Involved

Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 241, 260, 42 U.S.C. § 2000e-5(d) (1970), before its amendment in 1972, read as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The same provision, as amended by Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, and renumbered Section 706(e), 42 U.S.C. § 2000e-5(e) (Supp. II 1972), reads as follows:

> "(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlaw-

> ful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with in State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113, reads as follows:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter.

Questions Presented

1. Whether the limitations period for filing a charge with the EEOC begins to run from the final decision of a company after the completion of grievance-arbitration proceedings, or from the Company's initial decision prior to the commencement of those proceedings?

2. Whether the limitations period for filing a charge with the EEOC is tolled during the pendency of grievance or arbitration proceedings?

3. Whether the 1972 amendments to Title VII, enlarging the time for filing a charge with the EEOC to 180 days, should be applied to a charge pending before the EEOC on the effective date of the amendment?

Statement of the Case

This case presents questions concerning the application of the Title VII[3] administrative process. At issue is the continued viability of Title VII as a means for minority and female workers to have their allegations of discrimination heard in federal court, on the one hand, and on the other hand, to maintain the grievance-arbitration clauses of collective bargaining agreements as a viable means of informal conciliation and private settlement of employment disputes.

The petitioner, Dortha Allen Guy, brought this action under Title VII and the Civil Rights Act of 1866, 42 U.S.C. §1981. Guy alleged that her former employer, Robbins & Myers, Inc. (the Company), had discriminated against her because she was black, both in discharging her and in failing to reinstate her,[4] and that her labor union, Local 790 of the International Union of Electrical, Machine and Radio Workers (the Union), had not fairly represented her in grievance proceedings.

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[3] Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e *et seq.*

[4] Guy alleged that she had followed the Company rules for reporting absence due to sickness and that at least one white employee had followed the same procedures as she had but had been reinstated (6a-7a).

Guy was initially employed by the Company in 1968. From October 19th through the 24th, 1971, Guy was absent on sick leave. On the 25th Guy alleged that she called the Company and left a message that she would not be at work since it was necessary for her to visit her doctor. The Company discharged Guy on October 25 for having "voluntarily quit". Two days later, on October 27, 1971, Guy, who was a Union steward, caused a grievance to be filed[5] pursuant to the provisions of the collective bargaining between the Company and the Union. The collective bargaining agreement contained a specific provision barring racial discrimination in employment.[6] The grievance stated: "Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time" (18a). Guy expeditiously processed the grievance through the various steps provided by the grievance-arbitration clause.[7] The Company's Personnel Director

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[5] Guy visited her physician, was treated by him, and told not to report to work; accordingly, Guy did not report for work until October 29 (6a-7a). A co-worker filed the grievance on behalf of Guy.

[6] The agreement reads as follows:

Article XXXI—No Discrimination

Section 1. The provisions of this contract shall be applied to all employees without discrimination by either the Company or the Union on the account of sex, race, color, creed, or national origin. The parties further agree to comply with the provisions of the Age Discrimination in Employment Act of 1967 (35a).

[7] The four steps provided for in the Collective Bargaining Agreement (Article XVIII—Grievance Procedure) are as follows: Step 1 provides for proceedings between the employee and his foreman, Step 2 between the Chief Steward and the General Foreman, Step 3 between the Union Officers and representatives of Management, and Step 4 for arbitration (35a-6a).

This procedure is similar to grievance-arbitration clauses throughout industry. See *Basic Patterns in Union Contracts*, Eighth Edition—1975 (Washington, D.C.) ("Basic Patterns") at 32-5.

denied Guy's grievance on November 18, 1971 (18a-9a). Guy did not elect to pursue the grievance beyond the third step and the Union did not take the petitioner's claim to arbitration.

On February 10, 1972, 84 days after the Company's Personnel Director denied the grievance but 108 days after her discharge, Guy filed a charge with the EEOC, alleging racial discrimination in her discharge. On November 20, 1973, after it had accepted and processed the charge, the EEOC found that there was no reasonable cause to believe that the discharge was racially motivated.[8] After receiving her formal notice of right to sue, Guy instituted an action in the United States District Court on March 19, 1974.

The district court by order entered on June 12, 1974, granted the Company's motion to dismiss the Title VII cause of action because the petitioner had not filed her charge of discrimination with the EEOC within the 90-day period prescribed prior to 1972 by Section 706(d) of the Civil Rights Act of 1964,[9] (1a-5a). The petitioner's motion to reconsider was denied on June 19, 1974 (Pet. 6a-10a). On August 26, 1974, the District Court, on motions filed by both Guy and the Union, dismissed the complaint against the Union and re-aligned the Union as a party plaintiff (39a-40a). The Union and Guy appealed to the United States Court of Appeals for the Sixth Circuit.

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[8] A finding of no reasonable cause does not bar the aggrieved person from filing a Title VII action. *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 n.8 (1974).

[9] By an order entered on May 30, 1974, the district court dismissed Guy's cause of action under §1981 because of a failure to meet the applicable Tennessee statute of limitations (IUE, Pet. 14a-19a). No appeal was taken from this decision.

The Court of Appeals affirmed the dismissal of Guy's Title VII cause of action on October 24, 1975, by a divided vote (Pet. 11a-22a), and denied the petition for rehearing on December 9, 1975 (Pet. 23a). The Court of Appeals assumed that the limitations period for filing a charge with the EEOC commenced on October 25, 1971, rather than from November 18, 1971, when the Personnel Manager denied Guy's appeal through the grievance procedure; the court expressly held that it was barred from tolling the running of the limitations period by this Court's decisions in *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975), *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974), and *The Harrisburg,* 119 U.S. 199 (1886). Finally, the court held that the 1972 amendments to Title VII, insofar as they extended the period for filing an EEOC charge from 90 to 180 days, should not be applied to charges which were filed before the amendment but which were still pending on the effective date of those amendments.

ARGUMENT

I.

Petitioner's EEOC Charge Was Filed Within 90 Days As Required by Section 706 of Title VII Prior to the 1972 Amendment.

A. The Limitations Period Began to Run on November 18 When the Company Rejected Petitioner's Grievance, Rather Than When the Company Initially Decided to Discharge Her.

In ruling that Guy's EEOC charge was filed untimely, the Sixth Circuit held that it was barred from applying the doctrine of tolling in light of the decision in *The Harrisburg, supra,* and this Court's discussion in *Alex-*

ander v. *Gardner-Denver Co., supra,* and *Johnson* v. *REA, supra,* of the relationship of Title VII to other procedural mechanisms for remedying claims of employment discrimination. (Pet. 14a-18a) While this holding is incorrect, see Section B, *infra,* the question of tolling need not be reached. Petitioner maintains that the Company's decision to discharge her did not become final until the completion of grievance proceedings on November 18, 1972, and that the limitations period only commenced to run on that date.

However, Guy had a right to appeal this initial notice of discharge within the personnel administration of the Company by means of the grievance procedure.[10] Guy invoked the grievance procedure on October 27, in a good-faith effort to constructively resolve her complaint. During the three-step grievance procedure the decision rests exclusively with management.[11] (35a-6a) The grievance procedure provides for a quick, informal evaluation by Company managers of the initial employment decision; here the three-step process was completed in twenty-two days, from October 27 to November 18, 1971.[12] The discharge of Guy was not final until November 18, when the grievance procedure was exhausted; the limitations period should not have begun to run until that date.

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[10] The three steps of the grievance procedure provide for application by the aggrieved worker to officials of progressively greater responsibility in the Company's managerial hierarchy: the first-step application is made to the foreman, the second-step application to the General Foreman, and the third step application to "representaives of Management". (35a-36a)

[11] The Company's complete decision-making control only gives way in step 4, if the grievant elects to proceed to arbitration. (36a-37a)

[12] The three-step procedure must be completed approximately thirty-five days after a grievance is filed. (35a-6a) The express provision of short-time limits for invoking the grievance procedure is common in collective bargaining agreements. See *Basic Patterns, supra* at 33.

The pendency of a grievance proceeding, like the pendency of any other form of internal appeal to employers, renders the proposed company's decision tentative and nonfinal. Where implementation of the proposed decision is postponed pending that appeal, it would be obvious that the employer's decision could not be considered final. Where the implementation of some adverse action is not deferred, the employer stands ready, if the internal appeal is resolved in favor of the employee, to vitiate the effect of that interim implementation by hiring, promoting, or compensating the employee in any appropriate manner. Whatever interim measure the employer elects during the pendency of the internal appeal does not alter the tentative nature of the initial decision on which any such action might be based. So long as the employer has not made a final decision on the dispute involved, and holds out the possibility that a future decision may produce for the employee all he seeks, the employer should not be regarded as having made the firm decision to discriminate which would commence the applicable limitation period. Cf. *Brown* v. *General Services Administration*, 44 U.S.L.W. 4704 (June 1, 1976).

If the October 25 discharge were considered as a final act which commenced the running of a limitations period, then the Personnel Director's decision on November 18 approving of the discriminatory discharge would be considered a new "occurrence" for which the limitation period would commence on that date. Petitioner in the instant case alleged that she not only was discriminatorily discharged, but also that she was not reinstated because of her race.[13] It is unlikely that the issues regarding the legality of the decision on the grievance would differ sig-

[13] She specifically alleged that a white employee in similar circumstances had been reinstated. (7a)

nificantly from those regarding the tentative decision that was the subject of the grievance proceeding. A Company has the obligation to review initial supervisory decisions to insure that the subjective discretion of its supervisors is not used in a discriminatory manner.[14] This view is consistent with cases brought to remedy unfair labor practices in which the knowledge of the supervisors concerning the union activity of a worker, and the supervisor's actions, have been readily imputed to the employer for the purpose of determining the employer's anti-union purpose.[15] *A fortiori* under Title VII, where specific intent to discriminate is not a requirement,[16] it should be inferred that the facts pertaining to a discriminatory discharge are known by a Company Manager reviewing that decision and an approval by that Manager would thereby constitute a new act of discrimination.

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[14] The Circuit Courts have regularly held that unreviewed subjective supervisory discretion is a "ready mechanism for discrimination against Blacks". *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2nd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382-83 (4th Cir. 1972) *cert. denied* 409 U.S. 982 (1972); *United States* v. *Jacksonville Terminal Company*, 451 F.2d 428, 449 (5th Cir. 1971) *cert. denied* 406 U.S. 906 (1972); *United States* v. *United Carpenters' Local 169*, 457 F.2d 210, 215 (7th Cir. 1972) *cert. denied* 409 U.S. 851 (1971); *Rogers* v. *International Paper Co.*, 510 F.2d 340, 1345-46 (8th Cir. 1975) vac. and rem. on other grounds 423 U.S. 809 (1975).

[15] See e.g., *Texas Aluminum Co.* v. *NLRB*, 435 F.2d 917, 919 (5th Cir. 1970) (supervisor's knowledge of discharged employee's union activities imputable to employer for purposes of determining whether employee's discharge resulted from employer's anti-union discrimination); see also *Irving Air-Chute Co.* v. *NLRB*, 350 F.2d 176, 179 (2nd Cir. 1965); *NLRB* v. *Jas. H. Matthews & Co.*, 156 F.2d 706, 708 (3rd Cir. 1946); *NLRB* v. *Taylor Colquitt Co.*, 140 F.2d 92, 93 (4th Cir. 1943); *NLRB* v. *Texas Independent Oil Co.*, 232 F.2d 447, 450 (9th Cir. 1956).

[16] See *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

The Seventh Circuit has followed this analysis: "Under this reasoning, although the incident actually 'occurred' on October 24, 1966, for limitations purposes the 'occurrence' was not completed until Moore exhausted his promptly initiated contractual remedies. We therefore hold that, with respect to the October 24, 1966, incident, the statute began to run on February 16, 1976 [the date that the third-step grievance was rejected by the Company]." *Moore* v. *Sunbeam Corporation*, 459 F.2d 811, 827 (7th Cir. 1972).[17] Other courts which have applied the doctrine of tolling, see B *infra*, have expressly reserved ruling on the question of when the period of limitation should begin to run.[18]

Because Guy's rights under the collective bargaining agreement were not terminated until the final denial of the grievance on November 18, the Company's October 25 notification of discharge is analogous to an anticipatory breach of contract. Cf. *New York L. Ins. Co.* v. *Viglas*, 297 U.S. 672, 679-82 (1936). Guy has a right under the collective bargaining agreement to continuing employment unless discharged for cause; and Guy has a similar right under Title VII not to be discharged because of her race. Moreover, the agreement, like Title VII, specifically provides protection from a discharge resulting from racial discrimination. (35a) The continuing nature of the Company's obligation to provide employment on a non-discriminatory basis is shown by the fact that Ms. Guy could be made whole by payment of backpay and benefits if the Company reversed its decision during the grievance

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[17] See also *Phillips* v. *Columbia Gas of West Virginia*, 347 F. Supp. 533, 538 (S.D. W. Va. 1972) *aff'd* w.o. op., 474 F.2d 1342 (4th Cir. 1973).

[18] *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888, 893 n.5 (5th Cir. 1970); *Malone* v. *North American Rockwell Corporation*, 457 F.2d 779, 781 n.2 (9th Cir. 1972).

process. Cf. *Sampson* v. *Murray*, 415 U.S. 61 (1971). The initial notice of discharge does not finally terminate the employer's obligation to provide continuing employment, but rather expresses an intention to terminate in the future if the initial decision is upheld during the grievance process. After the renunciation of a continuing contract by one party, the other party has an option to consider himself absolved of any future obligation and to sue immediately, or alternatively, to postpone suit until irreparable breach occurs. *Roehm* v. *Horst*, 178 U.S. 1, 19 (1900). If the person, as petitioner did, elects to wait, the statute of limitations begins to run only from the date when the irreparable breach occurs which in this case was the date of the final denial of the grievance. See *Foss-Schneider Brewing Co.* v. *Bullock*, 59 F. 83 (6th Cir. 1893) and 4 Corbin, *Contracts*, §989 and cases cited therein.

That the Company's action was not final until the completion of the grievance process is dictated by the very nature of that process, regardless of the statutory policies involved. In fact, however, the statutory policies underlying Title VII clearly support this treatment of grievance proceedings. See *infra* at 17-22.

B. The Filing of a Grievance Pursuant to a Grievance-Arbitration Clause in a Collective Bargaining Agreement Tolls the Running of the Limitation Period Under Title VII.

1. The Relevance of Statutory Purposes to the Applicability of "Tolling".

Every appellate court, with the exception of the Sixth Circuit, which has considered the question has determined that the limitation period for filing a charge with the EEOC did not run during the aggrieved person's resort to the grievance procedure, see *infra* at 21-2. These courts

held that this conclusion was consistent with the Congressional policy favoring private settlement and voluntary compliance[19] and the Congressional intention not to have the statute read in an overly technical manner so as to destroy the Title VII rights of an employee who in good faith follows his contractual remedy.[20] In ruling that the limitations period was not tolled by the petitioner's good faith resort to the grievance procedure, the Sixth Circuit did not even consider the Congressional policies supporting tolling. Rather, the Sixth Circuit held that it was precluded from such consideration by *Johnson* v. *REA*, *Alexander* v. *Gardner-Denver Company*, and *The Harrisburg*.

In *Johnson* v. *Railway Express Agency*, this Court held that the filing of a Title VII charge with the EEOC did not toll the state statute of limitations applicable to the filing of an action pursuant to 42 U.S.C. §1981. *Johnson* is distinguishable from the instant case because it was grounded on the premise that where the statute of limitations is based on state law, the tolling rules as well must be derived from state law. 421 U.S. at 463-64. The decision does not bear upon the question of the Congressional intention with regard to the propriety of tolling the limitation period under a federal statute like Title VII.[21] The

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[19] *Culpepper* v. *Reynolds Metals Company*, *supra* 421 F.2d at 888, 891-92; *Moore* v. *Sunbeam Corporation*, *supra* 459 F.2d at 826-27; *Malone* v. *North American Rockwell Corporation*, *supra* 457 F.2d at 781.

[20] See e.g., *Culpepper* v. *Reynolds Metals Company*, *supra* 421 F.2d at 891-92. Cf. *Love* v. *Pullman Co.*, *supra* 404 U.S. at 526-27.

[21] In *Johnson* the Court used its determination that the remedies under Title VII and §1981 "are separate, distinct, and independent" as the starting point, not the conclusion as did the Sixth Circuit, for analyzing whether in that particular case the statute should be tolled. The Court then examined the appropriate state law and the pertinent Congressional intention. (421 U.S. at 462-

Court in *Johnson* expressly noted the distinction between the situation before the Court in that case and one, as here, in which the limitations period is "derived" directly from a federal statute rather than by reference to state law. 421 U.S. at 466. Where the Congressional policies underlying the federal statute, as here, require that the period of limitation be tolled, *Johnson* suggests that the courts adopt a tolling rule consistent with the statutory scheme. *Id.*[22]

The Court's decision in *Alexander* rather than prohibiting tolling of the limitations period, as the Sixth Circuit suggests, supports a "tolling" rule or, alternatively, that the limitations period is considered not to commence until the completion of the grievance procedure. *Alexander* holds that the grievance-arbitration procedures and Title VII actions are independent only in the sense that utilization of the former does not bar use of the latter. However, Title VII and the grievance-arbitration procedure "supplement" each other in achieving the national labor policy of equal employment opportunity which may best be achieved "by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause . . . and his cause

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66) The clear implication is that if the Tennessee state law or Congressional intention were otherwise, then the statute would appropriately be tolled. The Sixth Circuit because of its misinterpretation of *Johnson* wrongly thought itself precluded from examining the underlying Congressional purposes and intention in determining whether the filing of a grievance tolls the running of the limitations period.

[22] The Court expressly noted "how little is at stake" in *Johnson*, 421 U.S. at 467, n. 13. In *Guy* there is much at stake: the complementary maintenance of the essential policies of encouraging resort to the grievance-arbitration policy, voluntary compliance by unions and companies with fair employment laws, private and inexpensive settlement of equal employment disputes without resort to the federal courts, and the incorporation of fair employment practices into the law of the shop.

of action under Title VII", 415 U.S. at 59-60. See *infra* at 17-20.

The legislative intent "in this area . . . to accord parallel or overlapping remedies against discrimination", 415 U.S. at 47, requires a tolling rule that will not tend to encourage or force employees to choose between such remedies. The grievance-arbitration process provides in some instances an expeditious and inexpensive method for resolving complaints of racial discrimination,[23] but the process based on a collective-bargaining agreement and within the control of the Union and the Company is not designed for the full remedy of all claims of employment discrimination filed by individual employees.[24] 415 U.S. at 51. Combined with a tolling rule, the *Alexander* rule not barring resort to a Title VII action because of a prior election to pursue the contractual remedy will support the policies of favoring voluntary compliance and the resort to the grievance-arbitration procedure to resolve labor disputes.[25]

This Court has recently articulated the standard to be applied in order to determine whether a limitations period in a federal statute should be tolled:

> The proper test is not whether a time limitation is 'substantive' or 'procedural', but whether tolling the limitation in a given context is consonant with the

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[23] See *infra* at 18-9.

[24] Professor Edwards, in a recent study based on a questionnaire sent to arbitrators and on arbitration decisions, fully details this point. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, Proceedings of the Twenty-Eighth Annual Meeting National Academy of Arbitrators 59, 70-84 (BNA 1975); see also Coulson, *Title Seven Arbitration in Action*, 27 Labor Law Journal 141 (1976).

[25] In addition, such a ruling will encourage Unions and Companies to incorporate the national policy of fair employment into the "law of the shop", see *infra* at 18 n.28.

> legislative scheme. (footnote omitted). *American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 557-58 (1974).[26]

See also *Burnett* v. *New York Cent. R. Co.,* 380 U.S. 424, 426-27 (1965); *Midstate Horticultural Co.* v. *Pennsylvania R. Co.,* 320 U.S. 356, 360 (1943); see *Chase Secur. Corp.* v. *Donaldson,* 325 U.S. 304, 313-16 reh. den. 325 U.S. 896 (1945). Here the Congressional purposes supporting Title VII and the federal labor laws are clearly furthered by tolling the running of the limitations period during the period in which the worker invokes the grievance procedure.

Nor are there any equitable considerations which would weigh against a tolling rule. When the aggrieved person resorts to a grievance procedure in a constructive attempt to resolve his complaint there is neither a question that the worker has slept on his rights nor that the defendant has been prejudiced by the loss of evidence due to faded memories or the disappearance of witnesses. See *Burnett* v. *New York Cent. R. Co., supra* 380 U.S. at 428-29. In fact, because of the rapidity with which a grievance is filed, e.g., Ms. Guy filed a grievance two days after the notice of discharge, and processed, defendants will, as a general rule,

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[26] The Sixth Circuit misconstrued the scope of *The Harrisburg*. *The Harrisburg,* an *in rem* action brought under the admiralty jurisdiction of the federal court, does not apply to the facts of this case. The plaintiff sought recovery under the wrongful death statute of either Pennsylvania or Massachusetts; both statutes required the cause of action to be brought within one year. The Court simply held that litigants in federal courts who rely upon a state statute are properly bound by the limitation period contained within the state statute rather than by a federal time limit. *The Harrisburg, supra* 119 U.S. at 214. In *American Pipe and Construction Co.* v. *Utah,* 414 U.S. *supra* at 557, the Court expressly limited the holding of *The Harrisburg* (explaining that that decision did not "purport to define or restrict federal judicial power to delineate circumstances where the applicable statute of limitations would be followed".)

be informed of the complaint of discrimination earlier than if an employee only files an EEOC charge.[27]

2. *Encouragement of Voluntary Settlement of Labor Disputes.*

The decision of the Sixth Circuit, if allowed to stand, would seriously undermine the important national policy favoring conciliation and private compliance which is basic to both the fair employment and labor laws, and would unnecessarily impede implementation of this policy. In passing Title VII, Congress established "[c]ooperation and voluntary compliance . . . as the preferred means for achieving [the] goal" of providing equal employment opportunity, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44, although the federal courts are provided with final and plenary powers to enforce Title VII. *Id.* at 47. Similarly, collective bargaining and the arbitration of labor disputes is favored by federal labor laws. *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564 (1960). The grievance machinery is an essential element of national labor policy because it is the "vehicle by which meaning and content are given to the collective bargaining agreement" and, as a practical matter, serves to develop the " 'common law of the shop' ". *United Steelworkers of America* v. *Warrior & Gulf Co.,* 363 U.S. 574, 581-82 (1960).

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[27] The Court has been concerned not to bar claims because of a failure to meet a limitation period where the plaintiff has been induced to pursue private settlement. *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231 (1959); see *Ott* v. *Midland-Ross Corporation,* 523 F.2d 1367, 1370 (6th Cir. 1975). While Guy may not have been affirmatively induced by Robbins & Myers to pursue her collective bargaining remedy, she certainly relied on the effectiveness of the agreement entered into between the Company and the Union, as those parties would want. If the limitations period is not tolled by the filing of a grievance, difficult problems concerning whether the Company and Union induced reliance on the collective bargaining agreement will have to be litigated in virtually every case.

Alexander recognized that:

> . . . the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. 415 U.S., at 59-60.

Importantly, the Court wanted to preserve the opportunity for a continued merger of the means for enforcing the fair employment and labor policies: to encourage the incorporation of the requirements of equal opportunity in employment as developed by the federal courts pursuant to Title VII into the "common law of the shop". This incorporation would further the inexpensive, enforcement of federal law by the grievance-arbitration machinery. *Alexander, supra* at 550. *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 66-7 (1975). While this desirable result has not yet been achieved, there are strong indications that considerable progress has been made under the "spur and catalyst" of Title VII. For example, there has been a steep increase between 1965 and 1974 in the inclusion of provisions in collective bargaining agreements barring discrimination on the basis of race, color, religion, sex, national origin or age and thus including such discrimination specifically within the remedial framework of the grievance-arbitration machinery.[28]

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[28] In 1974 discrimination on the basis of race, color, creed, sex, national origin or age was banned in 74% of the contracts sampled, compared to 46% in the 1970 survey and only 28% in the 1965 survey. *Basic Patterns, supra* at 127; see also Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 Univ. of Chi. L. Rev. 30, 50 (1971); Hammerman & Rogoff, *The Union Role in Title VII Enforcement*, 7 Civil Rights Digest 22, 27-28 (1975); Newman, *Post-*

The failure to defer the running of the limitations period until after the final determination of the grievance (or to toll the running of the limitation period) will seriously jeopardize any positive effect which the grievance procedure may have in providing equal employment opportunity and will jeopardize the policy of informal conciliation and voluntary compliance. A worker would be required to file an EEOC charge while attempting to pursue his collective bargaining remedy. Once an EEOC charge is filed, the informal, intra-mural nature of the grievance procedure is disturbed by the entry of a third-party, the federal government. It may then be more difficult to informally resolve the complaint. While the grievance-arbitration procedure is not sufficient for resolving all employment discrimination disputes (*Alexander*, 415 U.S. at 50-1), it may be effective for resolving many types of grievance (415 U.S. at 55), including some of the pattern and practice variety;[29] but that effectiveness will be disturbed by requiring the simultaneous pursuit of formal EEOC remedies and thus negating the primary advantage of the grievance procedure, its private and informal nature.[30] Such a result would run counter to this Court's

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Gardner Developments in the Arbitration of Discrimination Claims, Proceedings of the 28th Meeting, National Academy of Arbitrators 36 (1975).

[29] *Emporium Capwell Co.* v. *Community Org. supra* 420 U.S. at 66-67.

[30] See *Note*, 47 Miss. L. J. 545, 558-59 (1976). Similarly, the Office of the General Counsel of the NLRB has taken the position that the limitations period for filing a charge of unfair labor practice, 29 U.S.C. §160(b), is tolled pending the resort to the grievance-arbitration procedures of a collective bargaining agreement. See Memorandum from Gerald Brissman, Associate General Counsel, to William E. Youngblood, Director Region 16, dated Nov. 18, 1974 *re* Chief Freight Lines, Inc. Case Nos. 16-CA-5202, 5459, 5466, 5467 and International Brotherhood of Teamsters Local No. 886, Case No. 16-CB-833. Copies of this Memorandum,

admonition in *Alexander* that "Title VII was designed to supplement, rather than supplant, existing laws and institutions," 415 U.S. at 48-9.

3. *Avoidance of Technical Requirements.*

Guy, like many other workers, was familiar with the rules of the shop and the procedures, the grievance mechanism, for enforcing the rules. An aggrieved worker would, as a matter of course, resort to the accessible grievance machinery; only after the grievance procedure has ended and its result known is a worker likely to consider alternative available action.[31] During the informal grievance and arbitration phase an employee is unlikely to consult with counsel or learn in any other way of court-made tolling rules that might require him to complain to EOCC. It is consistent with the common-sense expectations of the shop for the Court to hold that the limitations period does not begin to run until the grievance procedure has been exhausted. To do otherwise would penalize the worker for invoking familiar contractual remedies and for not being sophisticated enough to understand the availability and suitability of alternative legal remedies.[32] Cf. *Love* v. *Pullman Co., supra*, 404 U.S. at 526-27.

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along with a transmittal letter from the General Counsel of the NLRB to counsel for petitioner, will be lodged with the Court and served on all parties.

[31] "We do not think that Congress intended for a result which would require an employee, thoroughly familiar with the rules of the shop, to proceed solely with his Title VII remedies for fear that he will waive these remedies if he follows the rule of the shop or to do both simultaneously thereby frustrating the grievance procedure". *Culpepper* v. *Reynolds Metals Co., supra* 421 F.2d at 891-92; *Moore* v. *Sunbeam Corporation, supra* 459 F.2d at 827.

[32] See Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination, supra* at 48.

4. *Tolling Is Required by the Legislative History.*

In its deliberations concerning the Equal Employment Opportunity Act of 1972, Congress surveyed the effect and interpretation which the courts had afforded Title VII. As explicitly stated by a section-by-section analysis[33] of the bill, H.R. 1746 which was reported out by the Conference Committee and which was approved by the House and the Senate,

> [i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. 118 Cong. Rec. 7167, 7565 (1972).

Every appellate court which had considered the question prior to March, 1972, had held that the resort to the grievance-arbitration procedure tolled the running of the limitation period for filing a charge with the EEOC. *Culpepper* v. *Reynolds Metals Company,* 421 F.2d 888, 891-92 (5th Cir. 1970);[34] *Hutchings* v. *United States Industries,* Inc., 428 F.2d 303, 308-09 (5th Cir. 1970).[35]

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[33] The section-by-section analysis was prepared by the Senate co-sponsors of the Act, Senators Williams and Javits. Senator Williams introduced it as "an analysis of H.R. 1746 as reported from the Conference. . . ." 118 Cong. Rec. 7166 (1972). The identical section-by-section analysis was introduced into the House record by Representative Perkins, 118 Cong. Rec. 7563 (1972). The Conference Committee bill was accepted by both Chambers. *Id.* at 7170, 7573.

[34] Congress was fully aware of the decision in *Culpepper*. The decision had been cited with approval in Senate Report No. 415 at n.14-15, 92d Cong. 1st Sess. (1971).

[35] Cf. *Schiff* v. *Mead,* 3 EPD ¶8043 (6th Cir. 1970). Subsequently, every court, except the Sixth Circuit in *Guy,* has agreed that the limitations period should not run during resort to the grievance proceedings by the aggrieved person. *Moore* v. *Sunbeam*

Moreover, in keeping with its intent to make Title VII work as an effective remedy for employment discrimination and in order to encourage voluntary compliance and private settlement, Congress expressly approved those cases which had interpreted the time limitation for filing an EEOC charge "so as to give the aggrieved person the maximum benefit of the law". Section-by-section Analysis, 118 Cong. Rec. 7167, 7565 (1972). Furthermore, Congress approved a liberal judicial interpretation of a section of Title VII, §706(d), related to the section at issue, §706(e). Section 706(d) requires deferral to state fair employment agencies by the EEOC for a 60-day period. Congress approved the decision in *Love* v. *Pullman Co.*, 404 U.S. 522 (1972), which provided that the EEOC may receive and defer a charge to a state agency and then process the charge upon the lapse of the 60-day deferral period, even though the statute provides that no charge may be filed with the EEOC until 60 days after state proceedings are commenced. Congress also approved *Vigil* v. *A.T. & T.*, 455 F.2d 1222 (10th Cir. 1972), where the court held that in order to protect the aggrieved person's Title VII rights a charge filed with a state or local agency may also be filed with the EEOC during the 60-day deferral period. 118 Cong. Rec. 7167, 7565 (1972).

Corp. supra 459 F.2d at 827; *Malone* v. *North American Rockwell Corporation, supra* 457 F.2d at 781; *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974); *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F.Supp. 533, 538 (S.D. W. Va. 1972) *aff'd* w.o. op., 474 F.2d 1342 (4th Cir. 1973); see also *Burdzell* v. *FESCO Operations*, 8 EPD ¶9676 (W.D. Penn. 1974).

II.

The 1972 Amendment to Section 706, Enlarging the Time for Filing an EEOC Charge to 180 Days, Is Applicable to This Case.

In the Equal Employment Opportunity Act of 1972 Congress extended the time period for filing a charge with the EEOC from 90 days after the allegedly discriminatory act "occurred" to 180 days.[36] Petitioner's charge was pending before the EEOC on March 24, 1972, the date the Act became effective. Since that charge was filed 108 days after petitioner was first notified of her discharge, it was clearly timely if the Act is applicable to pending cases.[37]

Under this Court's ruling in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), the 1972 amendment applies to Guy's charge.

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. (416 U.S. at 711)

There is no claim, nor could there be, that the application of the amendment extending the filing period to 180 days "would result in manifest injustice."

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[36] Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, 42 U.S.C. §2000e-5(e).

[37] If petitioner had filed her charge between March 24, 1972, the effective date of the 1972 Act and April 22, 1972, 180 days after the initial notice of discharge, then there would be no question that the charge was timely. Accordingly, the Sixth Circuit, by holding that petitioner's charge was untimely is penalizing her for not having undertaken the superfluous act of re-filing with EEOC on or shortly after March 24, 1972. In effect, petitioner Guy was deprived of her day in court for filing too early rather than too late. Cf. *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

Moreover, there is specific statutory direction to apply the amendment of §706 to charges pending as of the effective date of the Act.[38] Section 14 of the Act, 86 Stat. 103, 113, provides:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter.

The plain meaning of Section 14, that the amendments to Section 706 apply to charges pending on the effective date of the Act, was clearly what Congress intended. The initial versions of the bills introduced in both the House and the Senate provided that any amendments to Title VII would not apply to charges filed with the EEOC prior to the effective date of the Act.[39] Section 14 originated in an amendment introduced by Senator Javits; the broad reach of its intended effect was expressed by his statement that the amendment "would make whatever we do enact into law applicable to pending cases", 118 Cong. Rec. 4816 (1972). This application of the 1972 amendments was stressed in both the House and Senate.[40]

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[38] See *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975) petition for writ of certiorari pending No. 75-836.

[39] H.R. 1746, 92d Cong., 1st Sess. §10 (1971); S. 2515, 92d Cong., 1st Sess. §13 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 32 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 46, 72 (1971).

[40] See 118 Cong. Rec. 7169 (1972), 118 Cong. Rec. 7567 (1972). The amendment was approved by the Senate after Senator Javits introduced it. 118 Cong. Rec. 4816 (1972). The House accepted the amendment in conference. Conference Rep. on H.R. 1746 (H.R. Rep. No. 92-899) 92d Cong. 2d Sess., 118 Cong. Rec. 6646 (1972); see also Joint Explanatory Statement of Conference Managers, 118 Cong. Rec. 6648 (1972).

This Court has applied other amendments enacted by the 1972 Act to administrative charges pending as of March 24, 1972. In *Brown* v. *GSA*, 44 U.S.L.W. 4704, (June 1, 1976), the Court affirmed the Second Circuit's ruling that Section 717 of Title VII which extended coverage to federal employees, applied to an administrative charge pending on March 24, 1972. In *Place* v. *Weinberger*, 44 U.S.L.W. 3714 (June 14, 1976), the Court vacated and remanded in light of *Brown* a decision of the Sixth Circuit which had refused to apply §717 to an administrative charge pending on March 24, 1972. Congress did not expressly provide, as it did for amended §706, that §717 should be applied to pending administrative charges. Having applied §717 to charges pending as of the effective date of the 1972 amendments the Court should, *a fortiori*, similarly apply §706.

The Sixth Circuit refused to apply the law in effect at the time of its decision because it viewed Guy's claim as having expired under the 90-day limitation period prior to February 10, 1972, the date she filed with the EEOC and therefore, it reasoned, the charge could not have been pending as of March 24, 1972 (Pet. 15a; 525 F.2d at 127). This ruling ignored the fact that the EEOC had accepted the charge on February 10, 1972, and was processing that charge until its final decision on November 20, 1973.[41] Once EEOC accepted the charge, its authority to process the charge was protected under the long-standing rule that administrative proceedings are considered pending until the

[41] EEOC accepted Guy's charge under its policy that the statutory limitation period is tolled during pendency of grievance proceedings. While EEOC has not published formal regulations on the subject, it has announced its interpretation in EEOC Decision No. 70-675, March 31, 1970, CCH EEOC Dec. 6142 (1973), CCH Emp. Prac. Rep. ¶2325.123, and EEOC Decision No. 71-687, Dec. 16, 1970, CCH EEOC Dec. ¶6186 (1973), CCH Emp. Prac. Rep. ¶2325.302.

agency renders a determination on the rights and obligations of the parties. *Marine Terminal* v. *Rederi. Transatlantic,* 400 U.S. 62, 71 (1970); *Sampson* v. *Murray,* 415 U.S. 61, 74 (1974).[42] The criterion of pendency is whether an action is in fact still under consideration in an appropriate tribunal on the date in question, not whether it should have been. Since the EEOC was clearly processing Guy's charge on March 24, the charge was pending and thereby, under the plain meaning of Section 14, the timeliness of the filing must be decided by the 180-day provision of the Equal Employment Opportunity Act of 1972.

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[42] This doctrine applies where the alleged infirmity is failure of the administrator's jurisdiction, see *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 49-50 (1938), and is therefore unaffected by the Court of Appeals' characterization of Guy's allegedly untimely filing as a jurisdictional defect. It is also consistent with the long-standing rule that jurisdiction exists for a court to issue orders, enforceable in contempt proceedings, with respect to cases before it, even if it is later determined that jurisdicion did not exist to rule on the merits. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 289-95 (1947); *United States* v. *Shipp* 203 U.S. 563 (1906).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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